vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1360 OF 1996

Smt.Rohini Shamrao Burud
c/o. Arun Laxman Bhavan
Kalifnath Road, Balasaheb Maharaj
Chawl, Morge Vasti, Shrirampur
Dist.:Ahmednagar ... Appellant

V/s.

M/s.Hindustan Petroleum Corporation
Hindustan Bhavan, Shoorji
Vallabhadas Marg, Mumbai ... Respondent

Mr.Sanjay B. Abhale for Appellant
Mr.P.K. Rele i/b Piyush Shah for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **AUGUST 18, 2005**
JUDGMENT PRONOUNCED ON: **OCTOBER 14, 2005**

JUDGMENT:

. This Appeal has been filed by the wife of the deceased-workman against the order of the Commissioner for Workmen's Compensation rejecting her application.

2. The deceased-workman was working with the Respondent doing the work of loading and unloading of goods. On 14.3.1990, at about 8.30 pm, the deceased met with an accident while riding his motor cycle opposite Mosco Bazaar, Darukhana, Sewree. The deceased was removed to JJ Hospital, Mumbai where he succumbed to his

injuries at about 10.30 pm. At the time of the accident, the deceased was 28 years of age and was drawing a monthly salary of Rs.4,000/- inclusive of allowances. By a notice issued under the provisions of Workmen's Compensation Act, the appellant called upon the respondent to pay compensation on account of the death of the workman. She claimed that he had died due to injury sustained by him arising out of and during the course of employment. The appellant claimed an amount of Rs.84,716/- alongwith interest, penalty and costs. Since there was no response from the respondent, the appellant filed an application before the Commissioner for Workmen's Compensation. The respondent opposed this application by contending that the workman was employed as a general workman in Hay Bunder complex at Mazgaon. On 14.3.1990, i.e., on the date when the accident occurred, he had punched his card showing that he had reported for duty at 16:36 hrs and had left the place of work on 23:26 hours. It was on 21.3.1990 that the respondent learnt of the death of the workman since his father had collected all his belongings from the lockers. The Respondent contended that although the deceased workman was employed in the shift i.e., 3pm to 11 pm, there was no need for him to have left the place of work and therefore, the accident which occurred at around 8.30 pm could not be on account of his official

duties. The injury sustained by the deceased was not arising out of and in the course of employment.

3. Evidence of the appellant was led. She deposed that her deceased husband had obtained a loan from the respondent and had purchased a motor cycle which he was riding at the time when he met with an accident. The Respondent adduced evidence of the Operation Officer of the company and the Deputy Manager working in the warehouse. Significantly, neither the applicant nor the respondent examined one Ghegadmal who was the pillion rider on the motor cycle of the deceased workman when the accident occurred. On a consideration of the evidence led before him, the Commissioner has concluded that the accident which occurred on 14.3.1990 at 8.30 pm did not arise out of and in the course of employment of the deceased workman. Therefore, the Commissioner has dismissed the application. The Commissioner was of the view that the evidence on record indicated that the deceased workman had left the place of work without permission and of his own sweet will. The Commissioner has found that the accident which occurred at 8.30 pm was not on account of the respondent having sent the deceased workman for any outdoor work and hence, dismissed the application.

4. Mr.Abhale, learned Advocate appearing for the Appellant, submits that admittedly the deceased was on duty between 3 pm and 11 pm. The attendance card has been punched at 23:26hours. He submits that the workman had been sent for duty to another depot alongwith his co-worker Ghegadmal and it was during this period that he met with the fatal accident. The learned Advocate further submits that the deceased was riding the motor cycle which had been purchased with the help of a loan given by the employer and, therefore, by applying the theory of notional extension, the deceased had met with an accident arising out of and in the course of employment. Reliance is placed on the judgments in the case of *National Iron & Steel Co. Ltd. v/s. Manorama Dassi*, **AIR 1953 CALCUTTA 143;** *Laxmibai v/s. Chairman & Trustees, Bombay Port Trust, Tax,* **AIR 1954 BOMBAY 180**; *Mrs.Santan Fernandes v/s. B.P. (India) Ltd.;* **AIR 1957 BOM 52**; *M.C. Shanthamallappa v/s. M.D. Chandappa Shetty*, **AIR 1958 MYSORE 116;** *Bai Shakri w/o. Naraindas Maganlal v/s. New Manekchowk Mills Co. Ltd.,* **AIR 1961 GUJARAT 34;** *General Manager, BEST Undertaking v/s. Mrs.Agnes*, **AIR 1964 SC 193;** *Mackinnon Mackenzie & Co.Pvt. Ltd. v/s. Ibrahim Mahommad Issak*, **AIR 1970 SC 1906** and *Usha Bai v/s. Yogendra Singh,* **2002 III LLJ 87.**

5. On the other hand, Mr.Rele, appearing for the

Respondent, submits that the appeal can be decided only if a substantial question of law has been raised. The appeal need not be entertained since a mere rejection of the application would not mean that a substantial question of law is involved in the appeal. He further submits that the Commissioner has considered the evidence on record and has concluded that the deceased workman had not met with an accident arising out of and in the course of employment. According to the learned Counsel, the fact that the deceased was employed in the second shift between 3pm and 11 pm has been proved. His card was punched after 11 pm on 14.3.1990 indicating that he had left the premises at that point of time. He submits that there is ample evidence on record to indicate that the deceased was not required to attend other depots while working at the Hay Bunder Depot at Mazgaon. Further, according to the learned Counsel, the accident is alleged to have taken place at 8.30 pm when there was no need for the deceased to be on the road since he was expected to be at the Hay Bunder Depot during his duty hours between 3 pm and 11 pm. The learned Counsel, therefore, urges that the appeal should be dismissed and the order of the Commissioner be confirmed.

6. There can be no doubt that the accident arose

out of and in the course of employment is a mixed question of law and fact. It is a substantial question of law as to whether on the basis of the evidence on record, the claim of the appellant could be denied.

7. There is no dispute that the deceased workman was employed with the respondent. There is also no dispute that he was on duty in the second shift on 14.3.1990. The timings of the second shift were between 3pm and 11pm. Undisputedly, the accident occurred at about 8.30 pm when the deceased was riding his motor cycle with one of his co-worker Ghegadmal as a pillion rider. The only question which would have to be considered is whether the deceased could have reasonably been riding the motor cycle at 8.30 pm on official duty. The appellant has not stated in her examination-in-chief that the deceased was required to attend different depots during the course of his duty. A suggestion put to her in the cross-examiantion that the company never sent her husband outside the premises has been denied. The Operation Officer Shiv Kumar Vishwas who was examined on behalf of the respondent has deposed that the workman was never sent out for official work out of the premises once he had reported for duty. This evidence recorded in the examination in chief has not been shaken in the cross-examination. The suggestion

put to this witness that workers were sent from one establishment to the other for the purposes of transacting business was denied. This witness has also denied that the General workmen in the category of which the deceased was working were required to attend other depots. The suggestion put to this witness that the motor cycle which the deceased was riding when he suffered the accident was given by the respondent has also been denied. The next witness examined for the respondent was the Deputy Manager (Warehouse). He has stated that the deceased was not set out on any official work when he was on duty on 14.3.1990. This witness has also denied that the general workers employed in the warehouse were required to leave the work place on official duty.

8. All this evidence on record suggests that the deceased met with an accident which occurred when he had left the official place of work. There is no evidence on record at all the indicate that he was sent out of the official duty when he met with the accident. Nor is there any evidence on record to establish the fact that there was a practice of sending the general workers out on official duty during their shift timings. The appellant has not examined Ghegadmal who would have been the best possible witness in the circumstances. He was

riding pillion with the deceased and would have been able to disclose as to whether the deceased had indeed left on official duty. Therefore, the appellant has not been able to prove that the deceased met with an accident arising out of and in the course of employment.

9. In the case of *Mackinnon Mackenzie & Co.Pvt. Ltd.* (supra), the Supreme Court has held that in the case of death caused by accident, the burden of proof rests upon the workman to prove that the accident arose out of the employment as well as in the course of employment. Direct evidence is not necessary. However, the facts proved must justify the inference that the death occurred on account of an accident arising out of and in the course of employment. The Supreme Court has held that the Commissioner should not surmise or conjecture or A..... but may draw legitimate inferences from the proved facts. In the present case, the evidence on record does not give any scope for drawing conjectures or surmises but a legitimate inference that the accident had not occurred during the course of employment. Merely because the accident occurred during the duty hours of the deceased, it could not be held that the accident arose out of and in the course of employment.

10. In the case of *General Manager, BEST Undertaking v/s. Mrs.Agnes* (supra), the Apex Court considered whether an accident which arises outside the factory premises could be considered as one arising out of and in the course of employment. On the basis of the theory of notional extension, the Supreme Court in that case held that an employee of BEST Undertaking using the free transport provided by the Undertaking could be said to be on the premises even while returning home in a bus and an accident which occurred during such a bus journey would amount to an accident arising out of and in the course of employment. In the present case, the learned Advocate for the appellant tried to draw an analogy to the facts in the case of *General Manager, BEST Undertaking v/s. Mrs.Agnes* (supra) by contending that the motor cycle which the deceased was riding belonged to the employer. This is not borne out from the facts on record. The motor cycle was obtained by securing a loan from the employer and therefore, it can hardly be said that the motor cycle was owned by the employee. Therefore, the theory of notional extension cannot be applied to the facts and circumstances in the present case.

11. The learned Advocate for the appellant cited the case of *Laxmibai v/s. Chairman & Trustees, Bombay Port*

Trust, Tax (supra), where the Division Bench of this Court has observed that a Judge must approach every problem that comes before him with compassion and humanity. There can be no doubt that this is a criterion which needs to be followed. However, the Division Bench has also observed that when it comes to a decision, the Judge has to decide according to law even though he may find a law harsh and cruel. In the facts and circumstances of this case, although it may seem harsh that the appellant herein, who was married to the deceased workman is denied compensation. However, the evidence on record does not permit any other conclusion and, therefore, even though one may have compassion and sympathy for the appellant, in law, she is not entitled to any compensation.

12. The other judgments referred to by the learned Advocate for the Appellant do not advance the case of the appellant in any manner. These judgments were decided according to the facts and circumstances arising in each case. However, the view taken in all the judgments except the judgment in the case of Ushabai (supra) as consistently been that it is necessary for claimant to prove that the death occurred due to an accident arising out of and in the course of employment. However, in the case of *Ushabai* (supra), a Division

Bench of the Madhya Pradesh High Court has held that it is for the respondent-employer to prove that an accident had not occurred during the course of and arising out of employment with the employer. This view is contrary to the view taken by the Division Benches of our Court in the case of *Mrs.Santan Fernandes v/s. B.P. (India) Ltd. (supra)* and *Mackinnon Mackenzie & Co.Pvt. Ltd.* (supra).

13. In this view of the matter, the judgment of the Commissioner for Workmen’s Compensation will have to be upheld.

14. Appeal dismissed. No order as to costs.